APPEAL NO. 180270
FILED MARCH 28, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on July 20, 2017, with the record closing on August 2, 2017, in (city), Texas, with (administrative law judge) presiding as administrative law judge (ALJ). Prior to issuing a Decision and Order in this case, (administrative law judge) ceased to be an ALJ with the Texas Department of Insurance, Division of Workers' Compensation (Division) and the case was reassigned to another ALJ, (administrative law judge), to listen to the CCH recording, review the evidence, and write a decision to resolve the issues in dispute. ALJ (ALJ) resolved the disputed issues by deciding that: (1) the respondent/cross-appellant (claimant) is a seasonal employee and his adjusted average weekly wage (AWW) is $0.00 from January 4 through April 19; $735.71 from April 20 through June 18; $0.00 from June 19 through July 26; $1,800.00 from July 27, 2015,[1] through September 6; and $43,823.53 from September 7 through January 3 of the following year; and (2) that the claimant had disability resulting from the compensable injury of (date of injury), for the period beginning on January 11, 2016, and continuing through December 12, 2016.

The appellant/cross-respondent (carrier) appealed the ALJ's determination that the claimant had disability resulting from the compensable injury of (date of injury), from August 31, 2016, through December 12, 2016, and complains further that the ALJ erred in referencing the year 2015 in Conclusion of Law No. 3 when the year cited in such conclusion of law should, in fact, be 2016. The claimant responded, urging affirmance of the ALJ's disability determination only.

The claimant appealed the ALJ's determination that the claimant is a seasonal employee as contrary to the great weight of the evidence. The carrier responded, urging affirmance of that portion of the ALJ's decision determining that the claimant is a seasonal employee.

DECISION

Affirmed as reformed in part and reversed and rendered in part.

SEASONAL EMPLOYEE

[1] The reference to the year 2015 is in error. All AWW adjustments determined by the ALJ are for the year 2016, except for the period from January 1 through January 3, 2017.

It is undisputed that the claimant sustained injury to his left knee on (date of injury), for which he underwent surgery on (date of surgery), including an anterior cruciate ligament reconstruction, medial meniscus repair and lateral meniscus repair. At the time of his injury, the claimant was employed as a professional football player by the (employer), playing as a member of the (football team). He was employed by contract, the term of which was from March 1, 2015, through February 29, 2016. The claimant had previously been employed by (employer) under a four-year contract beginning March 1, 2011, and continuing through February 28 or 29, 2015. The claimant's annual salary during the periods he was employed by (employer) was paid in 17 weekly installments during the regular football season. The claimant received additional payments during the offseason for his attendance at team-sponsored "Mini Camps," offseason workout programs, and training camp.

From a review of the Discussion section of his Decision and Order, it is apparent that the ALJ based his decision that the claimant was a seasonal employee under Section 408.043(d) on his understanding that the claimant played football during the regular football season but was not required to attend mini camps and offseason workout programs, which were voluntary, and "was free to devote his time to non-football related activities outside of training camp and the regular season. . . ."

Section 408.043(d) defines seasonal employee as "an employee who, as a regular course of the employee's conduct, engages in seasonal or cyclical employment that does not continue throughout the entire year." 28 TEX. ADMIN. CODE § 128.5(a) (Rule 128.5(a)) defines seasonal employee as "an employee who as a regular course of conduct engages in seasonal or cyclical employment which may or may not be agricultural in nature, that does not continue throughout the year."

The claimant testified that, although mini camps and offseason organized training activities were technically voluntary programs, participation in such programs was vitally important in the competitive atmosphere of professional football. He further testified, and the documentary evidence supported, that his annual contract required, both during the football season and offseason, that he maintain himself in excellent physical condition subject to examination and/or testing at the discretion of the team; that he devote at least four hours of service on the (Web Site) during each month of the contract term; that he provide a minimum of eight charitable or public relations related events, such as speaking engagements and personal appearances, during the year; and that he provide autographed items and memorabilia for charitable or public relations use by the team. The claimant further testified, among other things, that he was not allowed to engage in dangerous activities such as skydiving; that he was not allowed to engage in football related activities not related to the team; that he was required to conduct himself on and off the field with recognition of the fact that the success of

professional football depends on public respect; that he was required to cooperate with the news media; and even that he was prohibited from ingesting some legal substances contained in various foods.

We hold under the facts of this case that the claimant was required by his contract to further the business affairs of the employer throughout the term of the contract, which began on March 1, 2015, as well as the previous four-year contract, the term of which began on March 1, 2011. Although the claimant received payment of his annual salary in 17 weekly installments during the football season, the evidence fails to demonstrate a pattern of seasonal, cyclical employment that supports the ALJ's findings in this regard. The decision of the ALJ that the claimant is a seasonal employee is contrary to the great weight and preponderance of the evidence and, for such reason, no adjustment to the claimant's AWW should apply. We accordingly reverse the decision of the ALJ that the claimant is a seasonal employee and render a new decision that the claimant is not a seasonal employee. Because we have held that the claimant is not a seasonal employee, we reverse the decision of the ALJ that the claimant's adjusted AWW is $0.00 from January 4 through April 19; $735.71 from April 20 through June 18; $0.00 from June 19 through July 26; $1,800.00 from July 27, 2015, through September 6; and $43,823.53 from September 7 through January 3 of the following year and render a new decision that because the claimant is not a seasonal employee, his AWW shall not be adjusted.

DISABILITY

An issue regarding disability was certified by the benefit review officer for resolution at the CCH as follows:

> Did the [c]laimant have disability resulting from the compensable injury of (date of injury), and if so, for what period(s)?

At the CCH conducted on July 20, 2017, the parties agreed on the record to revise and restate the issue as follows:

> Did [the] [c]laimant have disability resulting from the compensable injury of (date of injury), from January 10, 2016, through December 12, 2016?

In his Decision and Order signed on December 19, 2017, the ALJ recites the disability issue as follows:

> Did [the] [c]laimant have disability resulting from the compensable injury of (date of injury), from January 11, 2016, through December 12, 2016?

In Finding of Fact No. 7, the ALJ found as follows:

7. As a result of his compensable knee injury, [the] [c]laimant was unable to obtain and retain employment at wages equivalent to his preinjury wage from January 10, 2016, through December 13, 2016.

In Conclusion of Law No. 4, the ALJ found as follows:

4. [The] [c]laimant had disability resulting from the compensable injury of (date of injury), for the period beginning on January 11, 2016, and continuing through December 12, 2016.

The evidence is sufficient to support a determination that the claimant had disability from January 10, 2016, through December 12, 2016, the period of claimed disability agreed upon and included in the issue as amended by the parties at the CCH on July 20, 2017.

Clearly, the ALJ simply failed to include January 10, 2016, as the beginning date of disability as reflected by the evidence and the disability issue agreed upon by the parties in his Conclusion of Law No. 4, Decision, and in the first paragraph of the Decision and Order. We accordingly reform Conclusion of Law No. 4, the Decision section and the first paragraph of the Decision and Order to provide that the claimant had disability resulting from the compensable injury of (date of injury), for the period beginning on January 10, 2016, and continuing through December 12, 2016, and we affirm the ALJ's disability determination as reformed.

SUMMARY

We reverse the ALJ's determination that the claimant is a seasonal employee and render a new decision that the claimant is not a seasonal employee.

We reverse the ALJ's determination that the claimant's adjusted AWW is $0.00 from January 4 through April 19; $735.71 from April 20 through June 18; $0.00 from June 19 through July 26; $1,800.00 from July 27, 2015, through September 6; and $43,823.53 from September 7 through January 3 of the following year and we render a new decision that because the claimant is not a seasonal employee, his AWW shall not be adjusted.

We affirm as reformed the ALJ's disability determination that that the claimant had disability resulting from the compensable injury of (date of injury), for the period beginning on January 10, 2016, and continuing through December 12, 2016.

The true corporate name of the insurance carrier is **GREAT DIVIDE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge